STATE OF MICHIGAN

COURT OF APPEALS

MARY URISKO, Plaintiff-Appellant/Cross-Appellee, v RICHARD F. X. URISKO, Defendant-Appellee/Cross-Appellant.	UNPUBLISHED November 12, 1999 No. 214266 Wayne Circuit Court Family Division LC No. 96-624312 DM
MARY URISKO, Plaintiff/Counterdefendant-Appellant, v RICHARD F. X. URISKO, Defendant/Counterplaintiff-Appellee.	No. 214902 Wayne Circuit Court Family Division LC No. 96-624312 DM

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ

HOEKSTRA, J. (*dissenting*).

I respectfully dissent from that portion of the majority opinion affirming the trial court's custody determination. I would find that some of the trial court's key findings were against the great weight of the evidence, and, consequently, that the trial court abused its discretion in granting custody of the children to defendant.

As my colleagues note in their majority opinion, custody disputes are to be resolved according the children's best interest. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 324; 497 NW2d 602 (1993). In reaching its decision, the trial court must consider the factors set forth in MCL 722.23; MSA 25.312(3).[1] We review the trial court's findings regarding these factors to determine whether

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

they are against the great weight of the evidence, and we review its decision to grant custody for an abuse of discretion. After reviewing the trial court's findings with respect to some of these factors, I find its application of the factors to be against the great weight of the evidence and her decision to grant custody to the father to be an abuse of discretion.

The trial court's finding with respect to MCL 722.23(l); MSA 25.312(3)(l) is the most appalling and egregious of its errors. Under this general provision, the trial court claimed that the mother had been insensitive to her son's needs during the divorce. In short, the boy had refused to travel to his grandparents' house for Christmas because it meant that he would miss playing in a hockey game. Plaintiff, physically unable to force the boy into the car, eventually called her father and brother in Kalamazoo to help her deal with the situation. Although the boy did eventually comply, plaintiff and her children did not arrive at the family gathering until late that evening, ruining the holiday. As a punishment, plaintiff forbade her son from playing in the rest of the tournament. Defendant then undermined plaintiff's effort at discipline by taking the couple's son to the hockey games. In recounting this incident, the trial court stated:

> However, this Court finds that mother's handling of the situation was insensitive and her choice of discipline was disproportionate to the incident. The father, on the other hand, has a greater ability to communicate and persuade the children to correct their behaviors and go along with what is expected of them.
>
> In this case, the Court finds that any rational parent also would have overruled mother's choice of discipline with respect to this incident. Therefore, this factor favors father.

I cannot understand how the trial court reached this conclusion. The mother's discipline was measured and appropriate, and the trial court's claim that any rational parent would have found otherwise suggests to me an inappropriate bias towards the defendant. Family, at Christmas time, is always a higher priority than a hockey game. Not only was plaintiff's discipline appropriate, the defendant's attempt to undermine plaintiff's authority was further evidence of his immaturity and effort to alienate the children from their mother. This incident weighs in plaintiff's favor, and I simply cannot comprehend the trial court's decision to use it as a point that favors defendant.

I also vehemently disagree with the trial court's application of MCL 722.23(d); MSA 25.312(3)(d), specifically as it pertains to the mother's ability to maintain a stable and continuous environment for the children. Defendant was unemployed at the time of the divorce, having apparently been asked to leave his position with his law firm. Plaintiff, on the other hand, was employed as a professor at a local college. Both parties graduated from the same law school. However, the trial court characterizes defendant as an "eminently qualified attorney," while claiming that plaintiff lacks stability and continuity. As I read the record, plaintiff admitted that she may have to seek a new, higher paying position now that defendant was unemployed. I do not understand the trial court's conclusion that this candor translates into a less stable situation for the children, especially when the defendant is unemployed. The trial court appeared to base its conclusion on defendant's professed intention to seek employment in the city, but, of course, nothing guaranteed that he would find a job locally. In fact, after

several months of looking, defendant could not find a job locally and eventually took a position in South Carolina.

I have concerns about several other factors that, when considered in light of the trial court's decisions on the matters discussed above, cause me to question whether the decisions were against the great weight of the evidence. For example, under MCL 722.23(e); MSA 25.312(3)(e), the trial court found that defendant was better suited to maintain the permanence of the family home. Given that defendant was unemployed and had failed to pay his income taxes (which can result in a lien being placed on any home that he does own), I find the trial court's emphasis on defendant's commitment to remain in the area to be indefensible. I can see no reason to find that this factor favors defendant. In fact, I maintain that it favors plaintiff.

Finally, the trial court's decision that MCL 722.23(g); MSA 25.312(3)(g) favored neither party also appears indefensible, based on this record. Defendant's behavior is childish and immature. He has clearly attempted to manipulate and alienate his children's affections for their mother. I find his sudden increased involvement in the children's lives to be a thinly veiled attempt to manipulate these proceedings, an effort which appears to have worked.

Consequently, I would find that the trial court abused its discretion in awarding custody to defendant.

/s/ Joel P. Hoekstra

[1] MCL 722.23; MSA 25.312(3) states:

> Sec. 3. As used in this act, 'best interests of the child' means the sum total of the following factors to be considered, evaluated, and determined by the court:
>
> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.